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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1343

UNITED STATES OF AMERICA ex rel., SAMUEL SAIKEN,

Petitioner,

vs.

PETER B. BENSINGER and JOHN J. TWOMEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is appended hereto (App. A) as is the order of denial of the Petition for Rehearing in Banc (App. B).

JURISDICTION

The jurisdiction of the Supreme Court of the United States to review the Judgment of the United States Court of Appeals by writ of *certiorari* is conferred by 28 U.S.C. § 1257(3).

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on December 6, 1976 (App. A).

The Petition for Rehearing in Banc was denied on December 30, 1976 (App. B).

QUESTIONS PRESENTED

Whether the Court of Appeals for the Seventh Circuit has changed the rule of law in relation to the question of "Curtilage" and thus rendered a decision in conflict with decisions of other Courts of Appeals?

Whether the Court of Appeals for the Seventh Circuit has misapplied *Stone v. Powell*, 49 L.Ed. 2d 1067 (1976) to these proceedings?

Whether the Court of Appeals for the Seventh Circuit has retroactively applied *Stone v. Powell*, 49 L.Ed. 2d 1067 (1976)?

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the due process and equal protection of the law clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE

This cause was initiated by the United States of America, ex rel., Samuel Saiken, by the filing of a Petition for Writ of Habeas Corpus on May 3, 1972. The Petition alleged that the search and subsequent seizure conducted on petitioner Samuel Saiken's farm in Chesterton, Indiana was conducted in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

The United States District Court held that the affidavit underlying the search warrant was constitutionally insufficient under the aforementioned provisions, 350 F. Supp. 1156 (N.D. Ill. 1972).

The United States Court of Appeals for the Seventh Circuit affirmed said finding and decision, but remanded the cause to the United States District Court to determine if the place searched was within the "curtilage" and thus constitutionally protected under the Fourth and Fourteenth Amendments to the Constitution of the United States, 489 F. 2d 865 (7th C.A. 1973).

Respondents then filed a Petition for Writ of Certiorari with the Supreme Court of the United States which was denied, 416 U.S. 910 (1974). Thus the cause was remanded to the District Court with the specific direction that:

> "We think the curtilage issue should be decided by the district court after the facts have had further illumination. If it be decided that a warrant was required, petitioner will be entitled to release, since it has been established that the warrant was issued on an insufficient affidavit."

No other issue remained.

The evidence submitted to the District Court on remandment was stipulated to by the parties and is the only relevant evidence in this cause. It is as follows:

1. The United States District Court of the Northern District of Illinois, Eastern Division and the Court of Appeals for the Seventh Circuit have decided that if a warrant was required Petitioner is entitled to release since it has been established that the warrant was issued on an insufficient affidavit and that a warrant would be required if the place searched was within the "curtilage".

2. That petitioner, Samuel Saiken, together with his wife, Minnie Saiken, owned the following described real property located in Porter County, Indiana, on February 19 and 20, 1969:

> The East 1/2 of the Southeast 1/4 of the Southwest 1/4 of Section 17, Township 37 North, Range 5 West of the Second Principal Meridian, containing about 20 acres more or less.

3. That petitioner's exhibit number 1, heretofore filed, is a survey plat of the aforedescribed property diagramming the location of improvements and fences contained thereon, is a true and accurate plat of said property and accurately locates the improvements and fences existing thereon on February 19 and 20, 1969.

4. That the location indicated by an encircled red X adjacent to the structure identified as number 15 on petitioner's exhibit number 1 accurately indicates the location of the body of Ellas Jean Scott on February 19 and 20, 1969 and is the site at which her body was discovered by the Indiana State Police on February 20, 1969.

5. That petitioner's group exhibit number 3, heretofore filed, consisting of 13 black and white photographs, truly and accurately portraying those matters which

they are purported to depict as more fully described thereon and by reference to petitioner's exhibit number 1.

6. That if Mrs. Minnie Saiken were called as a witness on behalf of respondents, she would testify as follows:

a. That she was the wife of the petitioner, Samuel Saiken and resided with him on February 19 and 20, 1969.

b. That between 1949 and February 19 and 20, 1969, and for a period of time thereafter, petitioner and Minnie Saiken resided in a home located at 10020 S. Oglesby in Chicago, Illinois.

c. That some time in 1966, the exact date being unknown to the witness, the witness and petitioner together with the Biological Research Products Company, purchased a farm in Porter County, Indiana for business purposes and for use as a weekend and vacation retreat, said farm being truly and accurately portrayed by petitioner's exhibit number 1.

d. That between 1966 and February 19 and 20, 1969, petitioner and the witness owned and operated a company known as Biological Research Products Company, located at 243 West Root Street, Chicago, Illinois, which company was engaged in the business of providing cattle and livestock embryos to colleges, universities and other institutions engaged in embryological research.

e. That subsequent to the 1966 purchase of the Indiana farm, petitioner and the witness maintained cattle and other livestock thereon for use in their previously described Chicago business.

f. That subsequent to their purchase of the aforesaid farm, petitioner and the witness erected or had erected

various fences thereon for the purpose of containing the livestock.

g. That subsequent to their purchase of the aforesaid farm, petitioner and the witness constructed or had constructed thereon a house consisting of a living room, kitchen, bedroom and garage, for use on vacation and weekend visits to the farm by petitioner and the witness.

h. That this house was completed sometime in 1967 and furnished during 1968.

i. That the location of this house is truly and accurately portrayed by the diagram, heretofore filed, respondents' exhibit number 2, drawn and signed by the witness.

j. That the aforesaid house is identified as structure number 3 on petitioner's exhibit number 1.

k. That the structure identified as structure number 1 on petitioner's exhibit number 1 is an old house which was located on the property at the time of its purchase by petitioner and the witness and was never used by them.

l. That during 1968 and the first part of 1969, the exact dates being unknown to the witness, petitioner and the witness employed one Al Raschke as a caretaker of the farm.

m. That during the period of his employment as caretaker, Mr. Raschke occupied a trailer located in the area designated as existing trailer parking area on petitioner's exhibit number 1.

n. That it was petitioner's practice to maintain geese in the goosehouse, designated as structure number 15 on petitioner's exhibit number 1, on a year-round basis, and to enclose the area immediately adjacent thereto with fences as located on petitioner's exhibit number 1 for the purpose of maintaining therein the aforesaid geese.

On August 4, 1975 the District Court found that the place searched was within the curtilage of the property of the petitioner and in accord with the direction of this Court issued the Writ of *Habeas Corpus*.

The Court of Appeals reversed the District Court and a Petition for Rehearing in Banc was denied.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The historic test as to whether a place is within the "curtilage", and thus constitutionally protected from illegal searches and seizures, is its use as an adjunct to the domestic economy of the owner. The sole exception being "open fields". *Care v. United States*, 231 F. 2d 22 (C.A. 10th, 1956); *Rosencranz v. United States*, 356 F. 2d 310 (C.A. 1st, 1966); and *United States v. Potts*, 297 F. 2d 68 (C.A. 6th, 1961).

The place searched was within a fenced area that included all the farm buildings and was adjacent to a goosehouse which was used for the domestic economy of the family.

The opinion of the Court of Appeals, wherein it was held that the goosehouse on petitioner's property was not within the curtilage, was based solely upon distance from the dwelling house (Op. 8-9). The opinion held that 400 feet was the distance between the dwelling and the goosehouse and has overlooked that the goosehouse was approximately 140 feet from a trailer occupied by a Mr. Raschke, the caretaker and resident of the property at the time of the search.

Taking this fact into consideration the goosehouse was approximately 100 yards closer to a dwelling than in *Walker v. United States*, 225 F. 2d 447 (5th 1955), upon which the opinion relies (Op. 9). The opinion ignores that the place searched was in the fenced area and not in an "open field".

Thus not only is the opinion predicated upon a misapprehension of fact but has attempted to change the well established rule of law established by the various Courts of Appeals.

II.

THE RULE OF *Stone v. Powell*, 49 L. Ed. 2d. 1067 WAS MISAPPLIED IN THIS PROCEEDING.

The opinion found that federal *habeas corpus* relief is unavailable to the petitioner because of the recent (July 6, 1976) decision of the United States Supreme Court in *Stone v. Powell* 49 L. Ed. 2d, 1067 in which this Court held (p. 1088 fn. 37):

> "In sum, we hold only that a federal court need apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation."

Petitioner's application for writ of *habeas corpus*, which is in issue herein, was filed on May 3, 1972, over four (4) years prior to *Stone*. The District Court found a Fourth Amendment violation, which was affirmed by the Court of Appeals, two years prior to the decision in *Stone* and remanded the cause solely for a factual determination of "curtilage"; an issue which was raised but not ruled on in the Supreme Court of Illinois. Thus the requisites of *Stone* have been complied with.

The Court of Appeals erroneous applied *Stone* in these proceedings.

III.

THE RULE OF LAW IN *Stone* WAS APPLIED RETROACTIVELY.

New judicial rules should apply prospectively. (*Linkletter v. Walker*, 381 U.S. 618; *Johnson v. New Jersey*, 384 U.S. 719; *Tehan v. U.S. ex rel. Shott*, 382 U.S. 406) Especially where there has been reliance on the former rules of procedure for this is one of the basis criterions of determining applicability. *Stovall v. Denno*, 388 U.S. 293; *Michigan v. Payne*, 412 U.S. 47.

The petitioner herein filed his application for Writ of Habeas Corpus over four years ago (May 3, 1972) under then accepted and well established rules of procedure (See: *Chevron Oil Co. v. Huson*, 404 U.S. 97). He employed counsel who has prepared pleadings and brief in the District court twice; the Court of Appeals, twice; and, an Answer to Petition for Certiorari in the United States Supreme Court. It would be basically unfair to now summarily deny *habeas corpus*—especially—where both the Court of Appeals and the United States District Court have found a denial of the rights afforded petitioner under the Fourth Amendment to the Constitution of the United States.

CONCLUSION

Wherefore in view of the foregoing petitioner respectfully prays that this Honorable Court grant this Petition for Writ of *Certiorari.*

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1408

UNITED STATES OF AMERICA ex rel. SAMUEL SAIKEN,
Petitioner-Appellee,

v.

PETER B. BENSINGER and JOHN J. TWOMEY,
Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 72 C 1097—**Thomas R. McMillen,** *Judge.*

ARGUED OCTOBER 27, 1976—DECIDED DECEMBER 6, 1976

Before MOORE, *Senior Circuit Judge,** PELL and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This appeal determines the applicability of *Stone v. Powell* to a habeas corpus petition decided by the district court prior to the decision in *Stone* and whether a goosehouse 400 feet from a farm dwelling is within the curtilage protected by the Fourth Amendment.

* Senior Circuit Judge Leonard P. Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

I

This case involved a particularly brutal murder of a 17-year old girl who "was a friend" of both a father and his son. The son, Joel Saiken, accused his father of the murder and the father, Samuel Saiken, accused the son. The body was found buried on the father's farm in Indiana after the son told a police officer the specific place where he had buried it following his father's admission to him that he had killed the girl.

A search warrant for the body was issued by an Indiana Justice of the Peace, based upon a police officer's affidavit relating the information given to him by the son. The informant supplied details about the sex and age of the body, its location, and the description and ownership of the farm. Assuming the credibility of the informant, one could readily infer that either the informant was present at the burial or was relating a report which he had reason to believe was based on observation. The body was found by the police, digging at the specified location.

The father was indicted for murder and conspiracy to obstruct justice. A jury returned a verdict of not guilty on the murder charge but found him guilty of conspiring to obstruct justice. He was sentenced to a term of not less than two nor more than three years. The conviction was affirmed by the Illinois Supreme Court in *People v. Saiken*, 49 Ill.2d 504, 275 N.E.2d 381 (1971) and certiorari was denied in 405 U.S. 1066 (1972).

The father-petitioner was granted a writ of habeas corpus releasing him from state custody in *United States ex rel. Saiken v. Elrod*, 350 F. Supp. 1156 (N.D. Ill. 1972). This court agreed with the district court that the affidavit for the search warrant was insufficient. *United States ex rel. Saiken v. Bensinger*, 489 F.2d 865 (7th Cir. 1973) (one judge dissenting). The majority concluded that the first prong of *Aguilar v. Texas*, 378 U.S. 108 (1964) ("the magistrate must be informed of . . . some of the underlying circumstances from which the informant concluded that the . . . [body] sought was where the informant claimed it was") was satisfied but that the second prong ("some of the underlying circumstances

from which the officer concluded that the informant was credible or his information reliable") was not satisfied. However, instead of affirming the district court, this court vacated the granting of the writ and remanded the cause to determine whether the search and seizure occurred beyond the curtilage of petitioner's farm residence and not within the Fourth Amendment's protection, in which case the insufficient credibility of the informant as evidenced by the affidavit would be immaterial. Our judgment in the first appeal was denied certiorari by the Supreme Court in *Felton v. Saiken*, 417 U.S. 910 (1974).

After remand the district court upon a stipulation of facts, found and concluded that the goosehouse near where the body was found, was within the curtilage of petitioner's farm. He thereupon entered summary judgment for the petitioner granting the writ. The respondents have appealed.

II

The district court's decision was entered on August 4, 1975. Almost a year later, on July 6, 1976, the Supreme Court of the United States decided *Stone v. Powell*, in which it held that:

> . . . where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

..... U.S. ..... (slip opinion at 14, 27) (footnote omitted).

In this case the State provided an opportunity for full and fair litigation of the Fourth Amendment claim. The Supreme Court of Illinois devoted most of its opinion to the petitioner's Fourth Amendment claim and concluded that "the search warrant was properly issued upon the affidavit." 49 Ill.2d 504, 275 N.E.2d 381 (1971), *cert. denied*, 405 U.S. 1066 (1972). It should be noted that in

Stone v. Powell the offender's conviction had been affirmed by the California District Court of Appeal and a petition for habeas corpus relief had been denied by the Supreme Court of California. The offender contended that since he did not seek a writ of certiorari on his direct appeal, "any diminution in . . . [the] ability to obtain habeas corpus relief on the ground evidence obtained in an unconstitutional search or seizure was introduced at . . . [the trial] should be prospective." The Supreme Court said that "[w]e reject these contentions" and the offender was "free to file a timely petition for certiorari prior to seeking federal habeas corpus relief." ..... U.S. ..... (slip opinion at 28, n.38). In the present case, the petitioner did file and had denied a petition for certiorari on his direct appeal prior to seeking federal habeas corpus relief, which makes this a stronger case for the application of *Stone v. Powell* than the facts there.

The petitioner contends nevertheless that *Stone v. Powell* should operate prospectively here. Actually this is not a true question of retroactive application. Recently we said in *United States v. Fitzgerald*, ... F.2d ..... (slip opinion in No. 75-1467, decided November 3, 1976, at 6):

> [W]here a change in the law has occurred between the date on which the lower courts ruled and the date on which that ruling was considered by us on direct appeal, . . . a true question of retroactivity [is not involved]. It is well established that when a lower court relies on a legal principle which is changed by a . . . decision prior to direct review, an appellate court must apply the current law rather than the law as it existed at the time the lower court acted.

In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court applied the exclusionary rule to the states and in that respect overruled *Wolf v. Colorado*, 338 U.S. 25 (1949). *Linkletter v. Walker*, 381 U.S. 618, 622 (1965) recognized a distinction between the application of a change in the law that takes place while a case is on direct review, on the one hand, and its effect on a final

judgment[1] under collateral attack, on the other hand. *Linkletter*, dealing with a Fourth Amendment search and seizure problem, did not apply *Mapp* fully retroactively to final judgments, but did apply it to cases pending on direct appeal. Likewise here, *Stone v. Powell*, holding that a state prisoner need not be granted federal habeas corpus relief where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, overruled *Kaufman v. United States*, 394 U.S. 217 (1969) to the extent that it held otherwise. As in *Linkletter*, we apply *Stone v. Powell* to the present case which is before us on direct appeal from the granting of the writ of habeas corpus. *Roach v. Paratt*, 541 F.2d 772 (8th Cir. 1976).

There would, of course, be no question whatever of the application of *Stone v. Powell* to this case if this were the first direct appeal. However, the petitioner argues apparently that since this is the second direct appeal after a remand, he has some vested interest in what was decided on the first direct appeal. Although he does not cite it, his position is somewhat supported by *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) where the Supreme Court referred to "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." The only contention which could be raised here is whether there is manifest injustice in applying *Stone v. Powell*.

The mandate after our first appeal ordered that "the judgment granting the writ of habeas corpus . . . be, and the same is hereby, VACATED . . ." and the cause remanded for further proceedings on the curtilage question. In *Board of Supervisors v. Tureand*, 226 F.2d 714, 717 (5th Cir. 1955), the Court of Appeals noted:

> Of course, the vacating by an appellate court of a judgment is not necessarily the same thing as a

[1] Final judgment is one where the availability of appeal has been exhausted or has lapsed and the time to petition for certiorari has passed. *Linkletter v. Walker*, 381 U.S. at 622, n.5.

> complete reversal and remand for a new trial, it being well settled that the latter requires all previous evidence to be reintroduced to have effect. . . . [T]he vacation of the judgment . . . indicates a desire primarily to place the record in such shape that the case may be tried again solely on . . . new criteria. . . .

Here the new criteria were the facts relating to curtilage. Nonetheless, the granting of the writ was vacated and annulled and we are on this second appeal reviewing the second granting of the writ on August 4, 1975. The situation is no different than on the first direct appeal with the exception that the unreliability of the informant has become the law of the case. If we had to reach that decision on this appeal, we would be bound to find that the informant was unreliable. In the meantime, *Stone v. Powell* was decided, which holds that we need not reach the question of the Fourth Amendment at all. The situation is similar to that in *Hildreth v. Union News Co.*, 315 F.2d 548, 550 (6th Cir. 1963), where the court said:

> We pass without comment so much of plaintiff's argument which challenges the correctness of our previous ruling, with the exception of the reference to a change in the applicable law by the recent decision of the Supreme Court in *Smith v. Evening News Assn.* [371 U.S. 195 (1962)]. Subject to the effect of that case, if any, our previous ruling is the law of this case and will not be reconsidered on this second appeal.[2]

We apply *Stone v. Powell* and need not decide whether the informant was reliable or not. If the fact that a district court's granting of a writ of habeas corpus is reversed on appeal is considered "manifest injustice" the

[2] The denial of certiorari by the Supreme Court in the first appeal here, 417 U.S. 910 (1974) adds nothing to the situation since the denial of certiorari is of no independent importance; the Supreme Court probably denied the writ because of the lack of finality of the first appeal which left the curtilage question open; and we agree in any event that the first appeal established the law of the case.

petitioner's contention would be sound, but we believe that the Supreme Court did not intend that a simple reversal be considered as manifest injustice. Nor did the petitioner ever have a vested interest in the granting of a writ which was vacated on appeal.

III

Nevertheless, assuming without deciding that it would be unjust to apply *Stone v. Powell* here, we proceed to consider the curtilage question. If the body was found outside the curtilage, it is immaterial whether the affidavit supporting the search warrant was sufficient inasmuch as no warrant would be required.

In *Hester v. United States*, 265 U.S. 57 (1924), involving a conviction of concealing distilled spirits, the Supreme Court affirmed the refusal to exclude the testimony of revenue officers of their finding moonshine whiskey near the house where the defendant resided even though the witnesses had no search warrant and were trespassers on the land. Mr. Justice Holmes said:

> . . . [T]he special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law.

265 U.S. at 59 (citation omitted).

Relying upon *Hester*, Judge Kiley said in *United States v. Sorce*, 325 F.2d 84, 86 (7th Cir. 1964) that "[t]he agents' entry into an 'open air nursery' was not unlawful" because "[t]he protection of the Fourth Amendment does not extend to 'open fields,' . . . nor to '[e]nclosed or unenclosed grounds . . . around . . . houses,'" citing *Martin v. United States*, 155 F.2d 503, 505 (5th Cir. 1946).

However Fourth Amendment protection *does* extend to the curtilage of the house, which has been defined as "an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling." *United States v. LaBerge*, 267 F. Supp. 686, 692 (D. Md. 1967).

A fairly well-accepted set of guidelines for ascertaining the curtilage appears in *Care v. United States*, 231 F.2d 22, 25 (10th Cir. 1956):

> Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family (citation omitted).

The following cases outline the distances between the respective house in each case and the outlying building or area considered to be either outside of, or within, the curtilage. The outbuildings or areas include a cave, stills, shed, small concrete building, chickenhouse, hog pen, embankment, barn, smokehouse, small cottage, and a Christmas tree stockpile.

	Outside Curtilage	Saiken Goosehouse	Within Curtilage
Care v. United States, supra.	one long city block		
United States v. Hassell, 336 F.2d 684 (6th 1964).	750 ft.		
Atwell v. United States, 414 F.2d 137 (5th 1969).	750 ft.		
Present case.		400 ft.	
Fullbright v. United States, 392 F.2d 432 (10th 1968).	150-300 ft.		
Hester v. United States, supra.	150-300 ft.		
Brock v. United States, 256 F.2d 55 (5th 1958).	150-180 ft.		
Hodges v. United States, 243 F.2d 281 (5th 1957).	150 ft.		
Janney v. United States, 206 F.2d 601 (4th 1953).	100 ft.		
United States v. Minton, 488 F.2d 37 (4th 1973).	80- 90 ft.		

	Outside Curtilage	Saiken Goosehouse	Within Curtilage
Walker v. United States, 225 F.2d 447 (5th 1955).			210-240 ft.
United States v. Mullin, 329 F.2d 295 (4th 1964).			75 ft.
United States v. Capps, 435 F.2d 637 (9th 1970).			40- 45 ft.
Wattenburg v. United States, 388 F.2d 853 (9th 1968).			20- 35 ft.

If the *Walker* case is temporarily removed from consideration, the cases display a perfect symmetry and enunciate a clear rule: any outbuilding or area within 75 feet of the house is within the curtilage and any outbuilding or area further than 75 feet is outside the curtilage. The government in its brief fixes the distance between the Saiken house and goosehouse at "over 380 feet" but the survey stipulated as correct by the parties shows that a direct line between the place next to the goosehouse where the body was located is more than 400 feet from the closest corner of the house. This is more than five times further away than what the appellate courts which have considered distances have deemed to be the maximum distance for a curtilage. The *Walker* case does not fit the pattern of all the other cases but the distance here is over one and one-half times the distance in that case. Therefore, upon the criterion of distance alone, the location of the body here was far beyond the "immediate surroundings" of a house and well outside the curtilage.

The Saiken farm contained about 20 acres, all of which was surrounded by a fence. All residential and agricultural structures were located on the south 5.5 acres and consisted of the house and some 14 outbuildings, including a general barn, a horse barn, a sheep shed, a cattle shelter, a chickenhouse and the goosehouse. The remaining 14.5 acres consisted of thick woods, brush and was low and swampy. This portion was clearly open fields. The goosehouse, next to which the body was found, was the structure furthest from the

public road from which access to the farm was gained, being 355 feet from the center line of the road. The area closely surrounding the goosehouse was enclosed with its own fence for the purpose of containing the geese, and obviously not for the privacy of the dwellers in the house. Between the dwelling house and the goosehouse were two portions of the farm driveway, a trailer parking area, a gate and at least one fence.

In *Janney, supra*, the hog pen was separated from the house by one private driveway and one fence. In *Hodges, supra*, the chickenhouse was separated from the dwelling by two fences. In *Brock, supra*, the concrete outbuilding was separated from the residence by one fence and one gate. In all of those cases, the outbuilding was held to be outside of the curtilage.

The Saikens' farm was purchased, maintained and operated as both a weekend and vacation retreat, and for business purposes. The Saikens owned and operated a business, known as Biological Research Products Company, engaged in providing cattle and livestock embryos to colleges, universities and other institutions engaged in embryological research. In *McDowell v. United States*, 383 F.2d 599, 603 (8th Cir. 1967), the court said:

> Although the Supreme Court has recently expanded the Fourth Amendment protection of the business enterprise, *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L.Ed.2d 943 (1967), it has not expanded such protection beyond that which a private dwelling and the curtilage thereof is likewise entitled. Therefore, a search of open fields, without a search warrant, even if such fields are construed as part of a commercial enterprise, is not constitutionally "unreasonable."

This quotation was incorporated favorably in our opinion in *United States v. Cain*, 454 F.2d 1285, 1287 (7th Cir. 1972).

We have noted that the district court concluded that the goosehouse was within the curtilage without hearing or seeing any witnesses but rather on a written stipulation of facts, which included a survey of the farm and is included in the record on appeal. We hold that insofar as the district court purported to find facts as to curtilage, he was clearly erroneous, F. R. Civ. P. 52(a), and insofar as he applied law, he reached the wrong legal conclusion.

The judgment granting the petition for writ of habeas corpus is reversed.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 30, 1976

Before

Hon. LEONARD P. MOORE, Senior Circuit Judge*

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA ex rel. SAMUEL SAIKEN, Petitioner-Appellee,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-1408 vs.	
PETER B. BENSINGER and JOHN J. TWOMEY, Respondents-Appellants.	No. 72-C-1097 Thomas R. McMillen, Judge.

On consideration of the petition for a rehearing by the Court in the above-entitled appeal, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestions for an en banc rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

* Senior Circuit Judge Leonard P. Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.